83-563

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HENRY S. BRANSCOME, INC. and HENRY S. BRANSCOME,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED *

1. Whether under this Court's decision in *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980), the government in a criminal Sherman Act case may prove an effect on interstate commerce through evidence concerning the alleged conspirators' total annual purchases of interstate products rather than through evidence related only to the quantity of those products used in the activities infected by the alleged conspiracy. The Court of Appeals in this case affirmed a conviction which, under the reading of *McLain* adopted by a majority of the Courts of Appeals, should have been reversed for lack of any evidence on the interstate commerce element of a Sherman Act offense.

2. Whether under this Court's decision in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), the government in a criminal Sherman Act case may prove an effect on interstate commerce through evidence that local roads resurfaced by the alleged conspirators are part of a "network" that ultimately is connected with interstate highways.

3. Whether under this Court's decision in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), a trial court may instruct a jury in a criminal Sherman Act case that it should consider whether "the highways, secondary roads and streets involved in the case were part of our network of interstate travel and commerce" in determining whether an alleged conspiracy to rig bids for resurfacing those roads constituted a "restraint of trade or commerce among the several States."

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* The parties to the proceeding below included a co-defendant at trial, the Basic Construction Company. The appeals of Petitioners and Basic were consolidated, but totally distinct points of error were raised by Basic. Basic also has filed with this Court a Petition for Writ of Certiorari, seeking review of the judgment of the Court of Appeals. No. 83-272 (August 19, 1983).

Petitioner Henry S. Branscome, Inc. is a Virginia corporation solely owned by Petitioner Henry S. Branscome and his wife. Branscome, Inc. has no parent company, subsidiaries or affiliates within the meaning of this Court's Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners Henry S. Branscome, Inc. and Henry S. Branscome pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

The Court of Appeals, in a per curiam opinion, affirmed Petitioners' convictions of one count of conspiring in restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1. The Court of Appeals' opinion is reported at 711 F.2d 570, and is set forth in the Appendix at 1a. The Court of Appeals denied a timely Petition for Rehearing and Suggestion for Rehearing En Banc in an Order reproduced in the Appendix at 10a.

The questions presented in this Petition were raised during trial and in post-trial motions filed with the District Court. The District Court denied those motions in an unpublished "Memorandum Order" reproduced in the Appendix at 11a.

On August 12, 1983, Petitioners filed with this Court an Application for Stay of the Mandate of the United States Court of Appeals for the Fourth Circuit. No. A-108. On that same date, Justice Brennan, to whom the Application had been referred, entered an Order temporarily staying the mandate of the Court of Appeals pending further order of this Court. Justice Brennan's Order is reproduced in the Appendix at 14a.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1983. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied in an Order dated August 5, 1983. This petition is filed within sixty days of the entry of that Order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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[1] Petitioners have been informed by the Clerk's Office that the Application thereafter was referred by Justice Brennan to the Court for final determination. The Application included appendices reproducing the opinions below, portions of the briefs in the Court of Appeals, and all portions of the trial record relevant to the questions presented in this Petition.

STATEMENT OF THE CASE

A. Proceedings Below

On October 13, 1981, Petitioners Henry S. Branscome, Inc. and its President, Henry S. Branscome, were indicted on a single count of conspiracy in restraint of trade or commerce among the States, in violation of the Sherman Act, 15 U.S.C. § 1. The indictment charged Petitioners, and alleged co-conspirators, with rigging highway resurfacing bids on "certain sections of the plant mix schedule work contracts let [by the Commonwealth of Virginia] in the Peninsula area in April, 1978." J.A. 22.[2] The indictment named as co-defendants the Basic Construction Company (petitioner in No. 83-272) and one of its employees, David M. Howell.[3] The unindicted co-conspirators were Rea Construction Company, Blakemore Construction Company, and officers of those companies.

Following pre-trial proceedings, the case was tried to a jury before United States District Judge John A. MacKenzie. Trial commenced on February 22, 1982, and the jury returned a verdict of guilty as to all three defendants on February 26, 1982. Following the verdict, Petitioners timely filed Motions for a New Trial and Motions in Arrest of Judgment pursuant to Rules 33 and 34 of the Federal Rules of Criminal Procedure. J.A. 54-59. Those motions, which raised the questions presented herein and which renewed trial motions for judgments of acquittal, were denied by the District Court in its Memorandum Order dated June 21, 1982. App. 11a-13a.

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[2] The Joint Appendix filed in the Court of Appeals will be designated herein as "J.A." The Appendix to this Petition will be referred to as "App." References to the trial transcript will be designated "Tr."

[3] Howell's trial was severed from that of the remaining defendants at the request of defendant Basic. Following a jury trial, on December 9, 1981, Howell was found guilty of participating in the alleged conspiracy. He did not appeal from that conviction.

On June 22, 1982, judgments of conviction were entered. Henry S. Branscome, Inc. was fined $225,000. The company president, Henry S. Branscome, was fined $18,000, and he was sentenced to a term of imprisonment of one year, all but 120 days of which were suspended, and a three year period of probation. J.A. 64-65. Those judgments of conviction and the conviction of co-defendant Basic were affirmed in a judgment of the Court of Appeals entered on June 27, 1983. The questions presented in this Petition, which were the principal issues addressed in Petitioners' brief in the Court of Appeals, and the only issues raised by Petitioners' counsel during oral argument, were not mentioned in the Court of Appeals' per curiam opinion. *See* App. 7a-8a.[4]

Because the Court of Appeals' judgment, in affirming the rulings of the District Court, created clear conflicts with prior decisions of this Court and other Courts of Appeals, Petitioners renewed their efforts to have the Court of Appeals address the questions presented herein. A timely Petition for Rehearing and Suggestion for Rehearing En Banc that again presented these questions to the Court of Appeals was denied, however, without opinion. App. 10a.

B. Statement of Essential Facts

The record facts pertinent to the questions presented may be summarized succinctly.[5] The indictment returned in this case alleged a simple conspiracy among four asphalt paving companies to divide among themselves certain "plant mix schedule work"—more commonly referred to as highway resurfacing contracts—in the Peninsula

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[4] In a section of the opinion addressing an argument raised by appellant Basic, the Court of Appeals did state: "We have considered the appellant's [*sic*] remaining assignments of error and find them to be without merit." App. 9a.

[5] A more detailed statement of the evidence presented at trial on the interstate commerce element of the offense is contained within the Reasons for Granting the Writ.

area of Virginia.[6] These contracts were let for bid by the Commonwealth of Virginia in April, 1978. The indictment did not allege that the defendants had engaged in similar bid-rigging conspiracies in other years or in other parts of Virginia, or that they had rigged bids with respect to any other type of highway construction or maintenance work, or any other private or public paving work. J.A. 22-23.

According to the evidence adduced at trial, the Commonwealth of Virginia is divided into eight highway districts. Each year the Virginia Highway Department determines that certain segments of the highways in each district need to be resurfaced. A schedule of resurfacing work is then prepared for each district, and the schedules are advertised for bid to asphalt paving contractors. Each contract to be awarded is an "item" on a district schedule. Tr. 153-56; 205.

The government's allegations and proof at trial focused exclusively on four schedule items in two highway districts let for bid by the Commonwealth on April 4, 1978. All four of the alleged conspirators submitted bids on Suffolk District item 5-D-8,[7] which called for repaving approximately eight miles of Routes 5, 31 and 199 in James City County. Henry S. Branscome, Inc. was the low bidder on that item and received the contract for a bid of $341,695. The government offered testimony from officials of the other three firms that bid on item 5-D-8—

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[6] The Peninsula area was defined by the indictment to be the area in and around the cities of Hampton, Newport News, and Williamsburg, including the counties of James City, York, Gloucester, Middlesex, and Mathews. *See* J.A. at 19.

[7] The contract items are designated by numbers and letters that refer to their location and the date of the letting. Each highway district has a number. The two districts at issue here are numbers 5 and 6, Suffolk and Fredericksburg. Thus, Job 5-D-8 refers to the Suffolk District schedule, item D on that schedule, and the year 1978. *See* Tr. at 207-08.

Blakemore, Rea and Basic—that they were informed what Branscome's bid would be, and that they agreed to make Branscome the low bidder.

The government offered further evidence that employees of Rea and Basic had decided among themselves that Rea would receive schedule item 6-H-8, which involved the resurfacing of approximately seven miles of Routes 33, 227 and 602 in Gloucester and Middlesex Counties, and that Basic would receive schedule items 6-I-8 and 6-J-8, which together involved the resurfacing of approximately six miles of Routes 17, 614, 621 and 642 in Gloucester and Mathews Counties. Basic and Rea were the only bidders on those three items. The government's witnesses testified, however, that in order for Basic and Rea to be assured that their arrangement would succeed, they needed to obtain agreements with other potential bidders on these Fredericksburg District items, principally Branscome and Blakemore. J.A. 131-34; 142-47.

The trial testimony, viewed from the light most favorable to the government, established that Henry Branscome agreed not to bid on items 6-H-8, 6-I-8, and 6-J-8 in exchange for a guarantee from Basic and Rea that he would be the low bidder on item 5-D-8. The testimony further established that Branscome agreed to pay John Blakemore, the president of Blakemore Construction Company, $18,000 if Blakemore would agree to submit a bid on the 5-D-8 job that was higher than Branscome's bid. Blakemore testified that this payment was made over one year later when Branscome overpaid Blakemore by approximately $18,000 for equipment that the Branscome Company had rented from Blakemore. J.A. 197-211.[8]

[8] Henry Branscome testified at trial that he never agreed to pay Blakemore any money to submit a "complementary bid" on the 5-D-8 job and that he had no interest in the Fredericksburg District items that Basic and Rea had divided among themselves. He testified further that the bid his company submitted on the 5-D-8 job was a competitive bid, developed in advance of the bid letting and never was revised to take advantage of the alleged collusive agree-

C. The District Court's Rulings on the Questions Presented

Throughout the trial proceedings, Petitioners asserted that under *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980), the government had to prove an effect on interstate commerce through those activities infected by the alleged conspiracy, and not through the defendants' general business activities. Thus, Petitioners asserted that the interstate commerce questions presented by this Petition had to be resolved in a narrow factual context—a single-count indictment involving an alleged collusive agreement among four asphalt paving contractors to divide among themselves twenty miles of state highway resurfacing work. But despite the narrow scope of the indictment, the evidence concerning the interstate commerce element of the offense that was offered by the government at trial, and admitted over repeated objections by Petitioners' counsel, had nothing to do with this alleged restraint of trade. In apparent reliance on an interpretation of *McLain* accepted by a minority of the Courts of Appeals, the government offered testimony and exhibits showing the *total yearly purchases* by the alleged conspirators of the one ingredient of asphalt that was produced outside of Virginia and used by these companies in *every aspect* of their businesses. Thus, it was the government's position that an effect on interstate commerce could be proved by evidence relating to the interstate aspects of the general business activities of the alleged conspirators, rather than the activities "infected" by the alleged conspiracy.

Moreover, the government urged upon the District Court and the jury the erroneous theory that because

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ment. Finally, although Branscome admitted paying Blakemore money to which he was not entitled in May, 1979, Branscome denied that this payment was made pursuant to an agreement reached in connection with the bidding on the 5-D-8 job a year earlier. J.A. 333-39.

the alleged conspiracy involved the resurfacing of roads, and because those roads ultimately were connected to interstate highways, the actions of the alleged conspirators necessarily were both in the flow of interstate commerce, and substantially affected that commerce. In support of this theory, previously rejected by this Court in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), the government offered expert testimony and a highway traffic study concerning traffic patterns on Interstate 64 and Interstate 95 (interstate highways that were not the subject of the resurfacing contracts), and the combined miles traveled by vehicles bearing out-of-state license plates on *all roads* in the Peninsula area.

By contrast, the trial record shows that the government offered *no evidence* concerning the quantity of interstate products purchased by the alleged conspirators for completing the twenty miles of road resurfacing contracts at issue. The government likewise offered *no evidence* concerning out-of-state vehicular traffic patterns on those small segments of rural roadway that were resurfaced pursuant to the alleged collusive bidding agreement.

The District Court admitted the government's irrelevant and prejudicial evidence and presented the government's erroneous legal theories to the jury. Even though the government conceded on appeal that its "in the flow of commerce" theory was untenable, and even though there is a clear conflict among the federal Courts of Appeals concerning the government's "effect on commerce" theory, the Court of Appeals failed even to address the questions presented herein. If it had addressed these issues, and resolved them in accordance with this Court's precedents and the majority position espoused by the Courts of Appeals for the First, Second and Tenth Circuits, the Court of Appeals in this case would have reversed Petitioners' convictions and remanded for entry of judgments of acquittal. Instead, the Court of Appeals simply ignored the District Court's errors, and affirmed Petitioners' convictions.

REASONS FOR GRANTING THE WRIT

One essential element of a Sherman Act offense is that the alleged anti-competitive conduct must constitute a "restraint of trade or commerce among the several States." 15 U.S.C. § 1. Thus, the government must offer sufficient proof at trial that the restraint involved interstate commerce, and the jury must be instructed on the government's burden to establish this element of the offense. *See United States* v. *Foley*, 598 F.2d 1323, 1328 n.2 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). *See generally United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 (1940); ABA Section of Antitrust Law, *Jury Instructions in Criminal Antitrust Cases 1964-1976*, at 169-75 (1978).

Under this Court's decisions interpreting the Sherman Act, the interstate commerce element of the offense may be sustained on proof that either (1) the challenged activities of the defendants were themselves "in the flow of" interstate commerce; or (2) the defendants' local activities nonetheless had "as a matter of practical economics" a "substantial" or "not insubstantial" effect on some identified aspect of interstate commerce. *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 241-42, 246 (1980). In this case, the principal legal issues addressed by the Petitioners prior to trial, during trial, in post-trial motions and on appeal all involved the sufficiency of the government's evidence and the propriety of the District Court's instructions under this two-pronged test of interstate commerce.

The questions presented by this Petition have engendered significant controversy and conflicts among the federal Courts of Appeals, and those conflicts concerning the jurisdictional reach of the Sherman Act are constantly recurring—both in civil and in criminal antitrust litigation around the country. The conflicting lower court decisions on these questions demonstrate a need for this Court's definitive guidance. Moreover, these questions are

particularly appropriate for resolution in this criminal Sherman Act setting, where the trial record is complete, clear and concise, and where this Court's decision may result in the reversal of erroneous convictions, the removal of a sentence of imprisonment, and the entry of judgments of acquittal.

A. Under the Reading of *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980), Adopted By a Majority of the Courts of Appeals, No Evidence Was Presented at Trial to Prove an Effect on Interstate Commerce

This case squarely raises the question whether an effect on interstate commerce under § 1 of the Sherman Act may be proved by examining the interstate aspects of the defendants' businesses in their entirety, or whether proof of such an effect must be limited to the interstate aspects of those activities that were "infected" by the alleged conspiracy. This question has created substantial, recurring conflicts among the federal courts based on divergent interpretations of this Court's decision in *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980). *See* pages 12-18, *infra*.

The trial record establishes that the asphalt paving material used by the alleged conspirators to resurface the local roads in question was manufactured in Virginia, but was made from a combination of locally-mined sand and aggregates and a petroleum by-product refined outside of Virginia. The petroleum by-product, known as liquid asphalt cement or AC-20, was purchased by the alleged conspirators from Texaco, Inc. and Chevron, U.S.A., Inc. Employees of those companies testified at trial and they introduced into evidence Government Exhibits 60 and 61, which summarized the yearly sales of AC-20 by those two oil companies to the alleged conspirators during the period between 1977 and 1979. J.A. 80-90; 121-26; 381-82. Counsel for Petitioners objected to

the introduction of these exhibits because the sales records that they summarized bore no relationship to the quantities of AC-20 purchased and used by the companies involved to manufacture the asphalt paving material needed to resurface the twenty miles of roadway placed in issue by the indictment. The District Court overruled these objections without explanation. J.A. 86, 124.

On cross-examination, these witnesses conceded that they had no knowledge concerning the uses to which the alleged conspirators put the AC-20 that they purchased, and that the exhibits did not show the quantities of AC-20 purchased for use in resurfacing the roads in question. In fact, several of the alleged conspirators had asphalt plants outside the Peninsula area, and the government's exhibits did not even break out the quantities of AC-20 delivered to the specific plants that manufactured the asphalt used on these jobs. J.A. 88 89; 126.

The effect of the District Court's ruling admitting this evidence was to permit the government to argue to the jury convincingly that the alleged conspirators purchased sufficient quantities of AC-20 to have a substantial effect on the interstate market for that product. For example, Exhibits 60 and 61 show that in 1978 the alleged conspirators purchased over $3 million worth of AC-20. J.A. 381-82. But those substantial quantities of AC-20 were purchased to manufacture asphalt used in the construction and repair of highways, parking lots and driveways all over Virginia, not only for the State Department of Highways, but also for federal contracting authorities and for private firms and individuals. By contrast, the government offered no evidence, and none appears in the record, concerning the quantities of AC-20 required and purchased to perform the contracts that were obtained pursuant to the alleged bid-rigging conspiracy. For that reason, Petitioners moved for judgments of acquittal at the close of the prosecution's case. This motion, renewed in post-trial briefs, was denied by the District Court, again without explanation. J.A. 214-15.

The District Court's rulings admitting the government's evidence on purchases of AC-20 and denying Petitioners' motion for judgments of acquittal clearly present for resolution by this Court the question of the proper interpretation of *McLain*, which has embroiled the federal courts in continuing conflict.

In *McLain*, the Court was confronted with a claim that a civil complaint alleging a price-fixing conspiracy among real estate brokers in New Orleans did not allege adequately an effect on interstate commerce. The Court observed that although real estate brokerage, like road resurfacing, may be a local activity, the plaintiffs could establish federal jurisdiction by demonstrating "a substantial effect on interstate commerce generated by [defendants'] brokerage activity." 444 U.S. at 242. The Court made this statement in the context of rejecting the defendants' claim that the plaintiffs were required to allege and prove that the conspiracy to fix commission rates itself had adversely affected interstate commerce. *Id.* at 242-43.

Some courts and commentators have misconstrued this passage from *McLain* to mean that it is always permissible for the plaintiff in a Sherman Act case to satisfy his burden of proof on interstate commerce by showing that the defendant's business as a whole has a substantial effect on interstate commerce. That was not the holding of *McLain*, nor does this interpretation of *McLain* follow from the Court's language. In *McLain*, the alleged agreement in establishing commission rates "infected" all of the defendants' brokerage activities. Thus, the Court observed that plaintiffs could satisfy their burden by focusing on the substantial effects on specified aspects of interstate commerce that were generated by the defendants' "brokerage activity." 444 U.S. at 242.

In a later passage of the *McLain* opinion the Court made it clear that it is not sufficient for plaintiffs in Sherman Act cases to establish an effect on interstate

commerce by proof concerning the defendants' general business activities if those activities are not implicated by the alleged offenses. In remanding the *McLain* case for trial, this Court stated:

> To establish federal jurisdiction in this case, there remains only the requirement that [defendants'] activities *which allegedly have been infected by a price-fixing conspiracy* be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved.

444 U.S. at 246 (citations omitted) (emphasis added).

The government tried this case on the theory that it need not show a practical economic effect on the interstate market for AC-20 caused by the "activities which allegedly [had] been infected by [the] conspiracy." *Id.* Rather, all of the government's proof concerning the alleged conspirators' purchases of AC-20 was directed to their business activities as a whole, and not just to the road resurfacing activities that were "infected" by the alleged bid rigging. Although the government's theory was contrary to the language of *McLain* and past holdings of this Court, it derived support for its position from the decision in *Western Waste Service Systems* v. *Universal Waste Control*, 616 F.2d 1094, 1096-97 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980). In that decision, and others since, the Court of Appeals for the Ninth Circuit has misread *McLain* to mean that "a party need only show that a defendant's general business . . . affected interstate commerce in order to meet the jurisdictional requirement." *Ronwin* v. *State Bar of Arizona*, 686 F.2d 692, 699 n.7 (9th Cir. 1981), *cert. granted sub nom. Hoover* v. *Ronwin*, No. 82-1474, 103 S. Ct. 2084 (1983).[9]

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[9] The petition for a writ of certiorari in *Ronwin* did not present this question, and thus resolution of that case does not promise to eliminate the substantial lower court confusion over the meaning of *McLain*.

The misinterpretation of *McLain* set forth in *Western Waste Service Systems* has been adopted by several federal district courts, and recently was cited with apparent approval by the Court of Appeals for the Eleventh Circuit. *See Construction Aggregate Transport, Inc.* v. *Florida Rock Industries, Inc.*, 710 F.2d 752, 766-69 & nn.30-31 (11th Cir. 1983); *Miller* v. *Indiana Hospital*, 562 F. Supp. 1259, 1283-85 (W.D. Pa. 1983); *United States* v. *H & M, Inc.*, 562 F. Supp. 651, 657 (M.D. Pa. 1983); *University Emergency Physicians* v. *Richmond County Hospital Authority*, 1982-83 Trade Cas. ¶ 65,097, at p. 71,151 (S.D. Ga. 1982); *McElhinney* v. *Medical Protective Co.*, 549 F. Supp. 121, 127 (E.D. Ky. 1982); *Feldman* v. *Jackson Memorial Hospital*, 509 F. Supp. 815, 821 (S.D. Fla. 1981).

The clear majority of the Courts of Appeals, however, have recognized the Ninth Circuit's misreading of *McLain* and have rejected the "general business activities test" of Sherman Act jurisdiction. The Court of Appeals for the Tenth Circuit, sitting en banc, specifically rejected a Sherman Act plaintiff's reliance on *McLain* for the proposition that jurisdiction may be established "if interstate commerce is substantially affected by the defendants' general or overall business." *Crane* v. *Intermountain Health Care, Inc.*, 637 F.2d 715, 721 (10th Cir. 1980). In so holding, the Court declined to adopt the reasoning of *Western Waste Service Systems*, because the acceptance of a "general business" test would work a substantial departure from this Court's precedents, and from the very language of *McLain* itself. *See* 637 F.2d at 721-24.

Crane's interpretation of *McLain*—that only those activities infected by the alleged conspiracy can be considered in demonstrating an effect on interstate commerce—has been twice reaffirmed by the Tenth Circuit, and also has been adopted by the Courts of Appeals for the First and Second Circuits. *See Furlong* v. *Long Island*

College Hospital, 710 F.2d 922, 925-26 (2d Cir. 1983); *Lease Lights, Inc.* v. *Public Service Co.*, 701 F.2d 794, 799-800 (10th Cir. 1983); *Mishler* v. *St. Anthony's Hospital Systems*, 694 F.2d 1225, 1227-28 (10th Cir. 1981); *Cordova & Simonpietri Insurance Agency, Inc.* v. *Chase Manhattan Bank*, 649 F.2d 36, 45 (1st Cir. 1981). Moreover, *Crane* and its progeny have been followed by many federal district courts outside those Circuits. *See, e.g., Englert* v. *City of McKeesport*, 564 F. Supp. 375, 376 (W.D. Pa. 1983); *Power East Ltd.* v. *Transamerica Delaval Inc.*, 558 F. Supp. 47, 49 (S.D.N.Y. 1983); *Pontius* v. *Children's Hospital*, 552 F. Supp. 1352, 1361 (W.D. Pa. 1982); *Cardio-Medical Associates, Ltd.* v. *Crozer-Chester Medical Center* (two opinions), 552 F. Supp. 1170, 536 F. Supp. 1065, 1072-85 (E.D. Pa. 1982); *Pao* v. *Holy Redeemer Hospital*, 547 F. Supp. 484, 488-90 (E.D. Pa. 1982); *Stone* v. *William Beaumont Hospital*, 1983-1 Trade Cas. ¶ 65,348, at p. 70,070 (E.D. Mich. 1981); *Malini* v. *Singleton & Associates*, 516 F. Supp. 440, 442 (S.D. Tex. 1981).[10]

This significant conflict among the federal courts over the meaning of *McLain* also has engendered substantial controversy among legal commentators.[11] Petitioners sub-

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[10] Examination of the cases suggests that within Pennsylvania alone two United States District Court Judges have adopted the Ninth Circuit's reading of *McLain*, while four Judges have rejected that interpretation. A seventh Judge has declined to enter the fray. *See Schnabel* v. *Building & Construction Trades Council*, 563 F. Supp. 1030, 1044 (E.D. Pa. 1983). The conflict among the federal courts also has been recognized, but not resolved, by the Courts of Appeals for the Sixth and Seventh Circuits. *See Bunker Ramo Corp.* v. *United Business Forms, Inc.*, —— F.2d ——, 1983-2 Trade Cas. ¶ 65,515, at p. 68,526 (7th Cir. 1983); *James R. Snyder Co.* v. *Associated General Contractors*, 677 F.2d 1111, 1113-15 (6th Cir. 1982).

[11] In three law review notes, *McLain* has been read erroneously to expand Sherman Act jurisdiction to those cases in which the defendants' general business activities may be proved to have a substantial effect on interstate commerce. The *Houston Law Review*

mit that the correct reading of *McLain*, and an explanation for the confusion, is set forth in the following passage from a recent law review article:

> Further confusion about the interstate commerce test has been introduced by the Supreme Court's most recent decision on this issue. In *McLain* v. *Real Estate Board of New Orleans*, the Court held that activities of real estate brokers in New Orleans that were "infected" by the brokers' price-fixing activities could have an effect upon interstate commerce sufficient to establish Sherman Act jurisdiction. This holding rejected the narrower view that the alleged violation itself must have an effect upon interstate commerce, with the Court reasoning that an alleged violation may not have any effect and thus could not be reached under the Sherman Act if only the violation's effects were considered on the jurisdictional issue. Unfortunately, there also is language in *McLain* which suggests that a plaintiff need only show that a defendant's total activities, independent of the alleged violation, have a substantial effect upon interstate commerce—if that language is read outside the context of the full opinion. *This reading of McLain, which has been followed by some lower courts, would in essence eliminate the interstate commerce test from antitrust law, since the total activities of virtually any defendant, no matter how local its business, are likely to have some effects upon interstate commerce.* Yet this reading is based upon an

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suggests that this expansion of federal jurisdiction is unwarranted and unwise, and that this Court should reconsider *McLain*. The *Drake Law Review* favors the broad reading of *McLain*. The *Georgia Law Review* warns of the serious repercussions that would result from an application of a general business activities test to nonjurisdictional issues arising under the Sherman Act. *See* Comment, *Expanding Federal Antitrust Jurisdiction: A Close Look at McClain v. Real Estate Board, Inc.*, 19 Hous. L. Rev. 143 (1981); Note, *"Affecting Commerce" Under the Sherman Act—How Local the Squeeze*, 31 Drake L. Rev. 155 (1981-82); Note, *The Interstate Commerce Test for Jurisdiction in Sherman Act Cases and Its Substantive Applications*, 15 Ga. L. Rev. 714 (1981).

> abstraction of language from its rightful context, and is unnecessary to justify *McLain* or any other Supreme Court decision on this issue. This suggestive language should thus be viewed as casual dicta at worst or simply an inadvertent expression that has been wrongly torn from its context by other lawyers and judges.

Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Calif. L. Rev. 595, 632-33 (1982) (footnotes omitted) (emphasis added).

The judgment of the Court of Appeals affirming Petitioners' convictions necessarily had the effect of accepting the District Court's evidentiary rulings and the government's explicit reliance on the *Western Waste Service Systems* line of decisions. *See* Brief for Appellee at 29-30 ("the government was only required to prove a substantial effect on interstate commerce generated by [Petitioners'] construction business").[12] Moreover, because the government presented *no evidence* tending to show an effect on the interstate market for AC-20 caused by the activities "infected" by the alleged conspiracy, Petitioners were entitled to a judgment of acquittal, unless the Ninth Circuit's reading of *McLain* is correct.[13]

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[12] In opposing Petitioners' application for a stay, No. A-108, the government argued that this case is not an appropriate vehicle for resolving the conflict among the Circuits because the District Court's instructions incorporated Petitioners' interpretation of *McLain*. Memorandum for the United States in Opposition, at 3-4. *See* App. at 16a. It should be noted that the trial court accepted Petitioners' proposed instructions on this point over the government's specific objection. More importantly, the fact that the jury received an instruction that correctly interpreted *McLain* is irrelevant given the fact that there was *no evidence* from which the jury could have found an effect on the interstate market for AC-20 caused by the activities placed in issue by the indictment. Under the majority view of *McClain*, this case never should have gone to the jury at all.

[13] On appeal, the government argued in a footnote that the jury could have found an effect on the market for AC-20 caused by the

This case thus squarely presents for resolution by this Court the substantial conflict among the Circuits concerning the meaning of *McLain*, even though the Court of Appeals did not choose to address that conflict in its opinion.

This case is a particularly appropriate vehicle for the resolution of the conflict. Most of the decisions cited above that have addressed the meaning of *McLain* have construed the "effect on interstate commerce" test in terms of the sufficiency of the allegations of a Sherman Act complaint. When the lower courts find that those allegations are insufficient, the plaintiff is given an opportunity to amend and to correct the deficiencies of his pleadings. Appeals from such decisions, when they are taken, are interlocutory in nature, and inappropriate for this Court's review. In this case, on the other hand, the judgments of conviction are final, and the trial record is complete. Moreover, the record facts are remarkably manageable. *All* the evidence concerning the alleged conspirators' purchases of AC-20 is contained in the testimony of two witnesses covering a mere 16 pages of the trial transcript, and two single-page exhibits. J.A. 80-90; 121-26; 381-82. Finally, Petitioner Henry S. Branscome will serve a sentence of imprisonment unless the Court selects this case as the vehicle to resolve the inter-

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activities infected by the alleged conspiracy by reasoning that the bid-rigging conspiracy increased the price paid by the Commonwealth for these contracts, thereby reducing the available state funds for other road resurfacing contracts, and concomitantly reducing the demand for AC-20. Brief for Appellee at 29, n.32. This argument never was presented to the jury by the prosecution or by the District Court in its charge, and for good reason. The government simply presented no evidence at trial concerning the Commonwealth's budget for road resurfacing projects that would have permitted an inference that an increase in the cost of the contracts at issue would have resulted in less road resurfacing work being let for bid. The government repeated this argument, based on presumed facts *dehors* the record, in its response to Petitioners' stay application. No. A-108, Memorandum in Opposition, at 5 n.6.

circuit conflict over *McLain*'s meaning. Thus, this case presents both an ideal and a compelling context for the issuance of the requested writ.

B. Under This Court's Decision in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), the Government's Evidence Concerning the Fact that the Roads in Issue Are Part of a Network That Ultimately Connects With Interstate Highways Was Irrelevant, As a Matter of Law, to the Interstate Commerce Element of a Sherman Act Offense

In addition to the evidence concerning purchases of AC-20, the government attempted to satisfy its burden of proof on the interstate commerce element of the offense under a theory rejected by this Court in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974). This theory was presented through a single witness, a Virginia Highway Department traffic engineer, who introduced into evidence Government Exhibit 11, a publication summarizing average daily traffic volume during the year 1978 on interstate, arterial and primary routes located in Virginia. J.A. 90-121; 373-76. Given the nature of the rural roads resurfaced pursuant to the alleged conspiracy, it is not surprising that the evidence introduced by the government through this witness involved statistics relating to everything but the volume of traffic on the segments of the roads actually at issue. All this evidence was admitted by the District Court over continuing defense objections. *See* J.A. 92, 94, 97-98, 99, 127-30.

The government's expert testified that some of the roads resurfaced pursuant to the alleged conspiracy are "connected" to Interstate 64, which was not itself one of the roads involved. J.A. 93-94. He went on to testify, based on Exhibit 11, concerning the number of "interstate vehicles" traveling on various segments of *Interstate 64* during a given day. The study was based on the number of vehicles counted on those segments of Interstate 64 on an average day that bore out-of-state license

plates. J.A. 98. Thereafter, the expert testified concerning the total number of miles traveled by vehicles bearing out-of-state tags on *all the roads* in the five counties of Virginia that constitute the Peninsula area. J.A. 98-100. The witness further testified that out-of-state vehicles traveling in the Suffolk and Fredericksburg Highway Districts accounted for approximately 35% of the total miles traveled in Virginia by out-of-state vehicles. J.A. 100-01. Finally, the witness testified that it was his opinion that the highway system in this country forms a network, that the interstate highways in the Peninsula area are major "collectors and distributors" of traffic within that network, and that the local roads placed in issue by the indictment are part of this interconnected highway nework. J.A. 101-04.

On cross-examination, the government's highway expert conceded that his testimony concerning the national interstate highway network was "premised essentially on the notion that every road in the country is somehow connected to every other road." J.A. 107. He further conceded that his testimony was not based on the "interstate character" of the roads resurfaced by the alleged conspirators, since he had no idea which segments of those roads were let for bid in April, 1978. *Id.* The expert testified that the Commonwealth did not even measure out-of-state vehicle mileage on the secondary roads that were placed in issue by this indictment. J.A. 108-09. As for the computation of the out-of-state mileage figures in Exhibit 11, he conceded that those figures were based solely on counts of vehicles bearing out-of-state tags and that the exhibit did not purport to be an "origin and destination" study that actually surveyed the number of interstate trips. J.A. 110-11. Finally, with respect to several of the road segments actually at issue, the expert used Exhibit 11 to determine approximately the relatively small number of vehicles bearing out-of-state tags that traveled on those roads during an average day. J.A. 115-18.

Petitioners' principal objection to the admission of this witness's direct testimony and Government Exhibit 11 was that the use of the roads in question by vehicles bearing out-of-state license tags is irrelevant, as a matter of law, to the interstate commerce inquiry. This objection was based explicitly on this Court's decision in *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974). J.A. 129.

On appeal the government argued that the *Copp Paving* decision is inapplicable to the "effect on commerce" test available to a plaintiff under the Sherman Act, and that Exhibit 11 was offered as proof under the "effect" test. *See* Brief for Appellee at 31, 36-38. This Court's decision in *Copp Paving*, however, precludes the government's reliance on the highway traffic study under either the "in the flow of commerce" test that it relied upon at trial, or the "effect on commerce" test to which it retreated on appeal.

The plaintiff in *Copp Paving*, an asphalt paving contractor with operations analogous to those of the Petitioners, claimed that the oil companies which produced AC-20 had fixed prices, had divided markets, and had engaged in price discrimination, tying practices, and attempts to monopolize, all in violation of the Sherman, Clayton and Robinson-Patman Acts. The District Court concluded that the plaintiff's jurisdictional showing under all three Acts "rested solely on the fact that some of the streets and roads in the Los Angeles area *are segments of the federal interstate highway system*, and on a stipulation that a greater than *de minimis* amount of asphaltic concrete is used in their construction and repair." 419 U.S. at 191 (emphasis added). The District Court held that showing to be insufficient to support federal jurisdiction, but the Ninth Circuit reversed, holding that " 'the production of asphalt for use in interstate highways rendered the producers "instrumentalities" of interstate commerce and place them "in" that

commerce as a matter of law.' " *Id.* at 192, quoting 487 F.2d at 204. This holding led the Court of Appeals to conclude that jurisdiction properly attached to all of Copp's claims under the Sherman, Clayton and Robinson-Patman Acts. This Court granted certiorari limited solely to the "in commerce" questions presented under the Clayton and Robinson-Patman Acts. *Id.* at 193. However, the Court's decision also addressed the "effect on commerce" questions that had been presented by Copp's complaint and that are at issue in this Sherman Act case.

After this Court held that Copp could not establish jurisdiction under the "in commerce" theory applicable to the Clayton Act by proof that the defendants supplied materials that were used in the construction and repair of intrumentalities of commerce, *i.e.*, interstate highways, 419 U.S. at 197-98, it turned to Copp's alternative contention that the Clayton Act should be read broadly to incorporate the "effect on commerce" test applicable to the Sherman Act. This Court declined the invitation to redefine the jurisdictional reach of the Clayton Act because of the total inadequacy of Copp's evidentiary showing. Justice Powell stated: "[Copp] presented no evidence of effect on interstate commerce. Instead it argued merely that such effects could be presumed from the use of asphaltic concrete in interstate highways." *Id.* at 202. Copp's "arguments" and "presumed effects" did not constitute the requisite evidence that "apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods [needed] to invoke federal antitrust prohibitions." *Id.*

The government has argued that its evidence in this case was more substantial than the proof offered under the "effect" test by Copp, because it attempted to quantify the use by out-of-state vehicles of the "interstate" highway network in the Peninsula area. Brief for Appellee, at 32. In fact, however, the government's evidence in

this case was far less substantial than the plaintiff's showing in *Copp Paving*. Copp at least proved that products manufactured by the defendants actually were used to construct segments of the federal interstate highway system. Here, the government showed only that the alleged conspirators resurfaced segments of local roads that ultimately were connected, like every other road is connected, to the federal interstate highway system.[14] Thus, the government's proof in this case stretched the "interstate highway nexus" theory specifically rejected by this Court in *Copp Paving* to new and even more "nebulous" limits. *See* 419 U.S. at 198.

The District Court ruled in this case that the holding of *Copp Paving* was not applicable to Sherman Act cases. App. at 12a-13a. The Court of Appeals implicitly adopted this narrow reading of *Copp Paving*, which has been rejected by the Court of Appeals for the Ninth Circuit. *See Thornhill Publishing Co.* v. *General Telephone & Electronics Corp.*, 594 F.2d 730, 737 (9th Cir. 1979). Such

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[14] In the Court of Appeals, the government relied on decisions construing Congress' power under the Commerce Clause in support of its argument that proof of interstate highway traffic may establish the requisite effect on interstate commerce in a Sherman Act case. *See* Brief for Appellee at 26, n.30 (citing *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964) and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964)). The government's evidence in this case did not establish *any effect* on interstate highway travelers caused by the activities infected by the alleged conspiracy. Moreover, in *Copp Paving* itself, this Court recognized that "[t]he jurisdictional inquiry under general prohibitions like . . . § 1 of the Sherman Act, turning as it does on the circumstances presented in each case and requiring a particularized judicial determination, differs significantly from that required when Congress itself has defined the specific persons and activities that affect commerce and therefore require federal regulation." 419 U.S. at 197 n.12. *See also Heille* v. *City of St. Paul*, 512 F. Supp. 810, 813 n.4 (D. Minn. 1981), *aff'd*, 671 F.2d 1134 (8th Cir. 1982) (application of the analysis of Commerce Clause decisions to cases arising under the Sherman Act "would read the interstate commerce requirement out of the . . . Act").

a narrow reading of *Copp Paving* is inexplicable in view of this Court's specific rejection of the "interstate highway nexus" theory in the context of the "effect on commerce" test of Sherman Act jurisdiction. Moreover, even assuming that highway traffic studies might be admissible in some Sherman Act cases to show an effect on commerce, the courts below clearly erred in permitting the government to introduce evidence concerning interstate highways not placed in issue by the indictment and total out-of-state vehicular mileage in county-wide areas. This Court should issue the requested writ because the District Court decided this important question of federal law in a manner that cannot be reconciled with this Court's decision in *Copp Paving*, and the Court of Appeals failed to correct that fundamental error.

C. The District Court's Instructions Improperly Permitted the Jury to Find the Essential Interstate Commerce Element of a Sherman Act Offense Based on Evidence Concerning the Fact that the Roads in Question Are Part of an Interstate Network of Highways

At trial, Petitioners proposed instructions to the District Court that: a) would have told the jury expressly that the activities of the defendants were not "in" interstate commerce, but that they could find the interstate commerce element of the offense based on the effects on commerce caused by defendants' local activities; and b) would have withheld from the jury's consideration the government's evidence concerning highway traffic patterns in the Peninsula area. J.A. 36-38. The government opposed Petitioners' proposed instructions, and the District Court charged the jury that they should consider whether "the highways, secondary roads and streets involved in the case were part of our network of interstate travel and commerce." App. at 16a. The Court did not make it clear to the jury whether this strand of the government's evidence was to be considered as an effect

on interstate commerce, or instead as placing the defendants' activities in resurfacing the roads within the flow of that commerce. In fact, although the District Court explained to the jury that there are two alternative "tests" of interstate commerce, it never informed them that one of those tests was not applicable to this case. *See* App. at 15a.[15]

In post-trial motions, Petitioners urged the District Court to grant them a new trial because the instructions permitted the jury to find that the interstate commerce element of the offense had been satisfied by proof concerning the interstate character of "our network" of highways. Petitioners argued that this instruction was based on the notion that highway resurfacing necessarily was "in the flow of interstate commerce," and that this theory of jurisdiction specifically had been rejected by this Court in *Copp Paving*. The District Court then ruled, for the first time, that the challenged instruction was "concerned with the facts from which the jury could infer a substantial effect on interstate commerce." App. at 13a. On appeal, the government adopted as its own the District Court's *post hoc* rationalization of its instructions. Brief for Appellee, at 26.

For the reasons stated in Part B, *supra*, the government's evidence concerning the highway traffic study was not sufficient proof of an effect on interstate commerce such that the jury should have been charged on that theory. Moreover, a reasonable jury would have construed the District Court's instructions on this point, to

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[15] In this regard, the District Court apparently accepted the government's stated trial position that the traffic study was relevant evidence under *both* prongs of the interstate commerce test. *See* Government's Consolidated Response and Opposition to Defendants' Pretrial Motions, filed Nov. 24, 1981, at 7-11; J.A. 27-28 (government's proposed instructions); J.A. 344-46 (government's closing argument).

the extent those instructions were comprehensible at all,[16] to permit them to return a verdict of guilt simply because the roads in question "were part of our network of interstate travel and commerce." App. at 16a. This theory of interstate commerce, which presumes that those who repair an instrumentality of interstate commerce are thereby placed "in" that commerce as a matter of law, was squarely rejected in *Copp Paving*. As Justice Powell concluded for the Court:

> Copp's "in commerce" argument rests essentially on a purely formal "nexus" to commerce: the highways are instrumentalities of interstate commerce; therefore any conduct of petitioners with respect to an ingredient of a highway is *per se* "in commerce." Copp thus would have us expand the concept of the flow of commerce by incorporating categories of activities that are perceptibly connected to its instrumentalities. . . . The chain of connection has no logical endpoint. The universe of arguably included activities would be broad and its limits nebulous in the extreme. . . . *More importantly, to the extent that those limits could be defined at all, the definition would in no way be anchored in the economic realities of interstate markets, the intensely practical concerns that underlie the purposes of the antitrust laws.*

410 U.S. at 198 (citations omitted) (emphasis added).

Given the record in this case, the District Court's ruling that the challenged instruction was designed to present to the jury evidence concerning an effect on commerce is not entirely convincing. Other courts have recognized that the "instrumentalities" theory of interstate com-

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[16] The District Court's charge to the jury on interstate commerce was drawn in equal parts from the diametrically opposed instructions proposed by Petitioners and the government. As a result, the instructions failed to give the jury any meaningful guidance on this complex issue. *See* J.A. 365-66 (Petitioners' objections to the charge).

merce is an offspring of the "in the flow of commerce" test, and not the "effect on commerce" test. *See Construction Aggregate Transport, Inc.* v. *Florida Rock Industries, Inc.*, 710 F.2d 752, 770 n.33 (11th Cir. 1983); *Thornhill Publishing Co.* v. *General Telephone & Electronics Corp.*, 594 F.2d 730, 737 (9th Cir. 1979). In any event, this Court's decision in *Copp Paving* should have precluded the District Court from instructing the jury at all concerning the government's nebulous theory that the roads in question were part of "our network of interstate travel and commerce." Because the jury may have concluded that the government satisfied its burden of proof on the interstate commerce element of the offense solely by virtue of this evidence concerning purported interstate traffic moving on highways in the Peninsula area, the convictions of Petitioners must be reversed, even if the evidence concerning purchases of AC-20 was adequate to sustain the convictions. *See Yates* v. *United States*, 354 U.S. 298, 312 (1957); *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931). The Court of Appeals' affirmance of Petitioners' convictions thus was in conflict not only with this Court's decision in *Copp Paving*, but with the principles of *Yates* and *Stromberg* as well.

CONCLUSION

This case affords the Court an opportunity to resolve a frequently-recurring and growing conflict among the Courts of Appeals concerning how an effect on interstate commerce may be proved in cases arising under the Sherman Act. The questions presented are important because they arise during the pleading and proof stages of all Sherman Act cases, both treble damage actions by private parties and criminal prosecutions by the government. Moreover, the questions raised herein are presented on a trial record that is remarkably manageable and clear. Finally, if Petitioners are correct in their interpretations of this Court's controlling precedents,

their criminal convictions must be reversed and the case remanded for entry of judgments of acquittal.

For all the reasons set forth herein, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated: October 4, 1983

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

Nos. 82-5200
82-5207
82-5208

UNITED STATES OF AMERICA,
Appellee

v.

BASIC CONSTRUCTION COMPANY,
HENRY S. BRANSCOME,
HENRY S. BRANSCOME, INC.,
Appellants

Appeal from the United States District Court
for the Eastern District of Virginia, at Newport News
John A. MacKenzie, District Judge

Argued February 9, 1983
Decided June 27, 1983

Before: BUTZNER, Senior Circuit Judge, and RUSSELL and WIDENER, Circuit Judges.

Lewis T. Booker (L. Neal Ellis, Jr., Hunton & Williams, on brief) and William J. Murphy (Vincent J. Fuller, Barry S. Simon, Linda C. Ray, Williams & Connolly; William F. Miller, Rideout & Miller, on brief) for Appellants; Margaret G. Halpern, Department of Justice (William F. Baxter, Assistant Attorney General; John J. Powers, III, Department of Justice; Theresa H. Clinton, Diane R. Kilbourne, on brief) for Appellee.

PER CURIAM:

This is an appeal from a conviction for violation of section 1 of the Sherman Act, 15 U.S.C. § 1. The defendants, Basic Construction Co., Henry S. Branscome, Inc., and Henry Branscome, were charged with conspiring in April of 1978 to rig the bidding for state road paving contracts. A jury found the defendants guilty, and both Basic and Branscome [1] appeal. We affirm.

I.

Basic's principal contention is that the district court gave erroneous jury instructions regarding the criminal liability of a corporation for acts of its employees. With regard to corporate liability, the court instructed the jury as follows:

> A corporation is legally bound by the acts or statements of its agents done or made within the scope of their employment, and within their apparent authority, acts done within the scope of employment and acts done on behalf of or to the benefit of a corporation, and directly related to the performance of the type duties the employee has general authority to perform.
>
> . . . .

[1] Henry S. Branscome, Inc., and its owner, Henry Branscome, filed a joint appeal. Together they will be referred to as "Branscome."

> When the act of an agent is within the scope of his employment or within the scope of his apparent authority, the corporation is held legally responsible for it. This is true even though the agent's acts may be unlawful, and contrary to the corporations [sic] actual instructions.
>
> . . . .
>
> A corporation may be responsible for the action of its agents done or made within the scope of their authority, even though the conduct of the agents may be contrary to the corporation's actual instructions, or contrary to the corporation's stated position.
>
> However, the existence of such instructions and policies, if any be shown, may be considered by you in determining whether the agents, in fact, were acting to benefit the corporation.

At trial, Basic introduced evidence which would have tended to prove that it had a longstanding, well known, and strictly enforced policy against bid rigging. Such evidence tended to show that the bid rigging activities for which it was charged were perpetrated by two relatively minor officials and were done without the knowledge of high level corporate officers. Basic argues that, in light of this evidence, the district court should have instructed the jury that it could consider the evidence of Basic's antitrust compliance policy in deciding whether the company had the requisite intent to violate the Sherman Act.

Basic rests its argument primarily on *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). *Gypsum* involved a criminal antitrust prosecution in which the district court had instructed the jury that, if it found that the practice of competing producers giving to other producers on request, the price of gypsum board that was currently offered to a specific customer had the effect of fixing or raising prices, then they should presume as a

matter of law that the parties intended such a result. *Id.* at 434. The Supreme Court held that these instructions were erroneous. The Court said that intent is an element that must be proved, and cannot be presumed, in a criminal antitrust prosecution. *Id.* at 434-36. Basic argues that the instructions given by the district court in the instant case run counter to the holding in *Gypsum* because they fix absolute criminal liability on a corporation for acts done by its employees, although such acts may have been in violation of corporate policies and express instructions. *Gypsum*, Basic argues, requires that the government prove that the corporation, presumably as represented by its upper level officers and managers, had an intent separate from that of its lower level employees to violate the antitrust laws. Consequently, Basic asserts that the jury should have been instructed to consider corporate antitrust compliance policies in determining whether Basic had the requisite intent.

We do not think that *Gypsum* requires so much. Rather, the case, on the point at issue, holds that intent to violate the antitrust laws must be proved in a criminal antitrust prosecution, and it defines the required intent. The Court there was not confronted with, and did not decide, the issue of corporate liability for the acts of employees. The instructions given by the district court in the instant case are amply supported by case law. *See United States v. Koppers Co.*, 652 F.2d 290, 298 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 204-05 (3d Cir. 1970), *cert. denied*, 410 U.S. 948 (1971). These cases hold that a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if, as in *Hilton Hotels* and *American Radiator*, such acts were against corporate

policy or express instructions. In *United States v. Koppers Co.*, the Second Circuit rejected the argument, as do we, that *Gypsum* changes the law on corporate criminal antitrust liability for the acts of its employees. 652 F.2d at 298.

In the instant case, the district court properly allowed the jury to consider Basic's alleged antitrust compliance policy in determining whether the employees were acting for the benefit of the corporation. It also properly instructed on the issue of intent in an antitrust prosecution, i.e., that corporate intent is shown by the actions and statements of the officers, directors, and employees who are in positions of authority or have apparent authority to make policy for the corporation.

II.

Basic also argues that the court erroneously admitted evidence of an admission by silence by one of Basic's corporate officers, William Shaw. At trial, one of Basic's minor officials, Colosi, testified about a meeting he had with Shaw and another minor official of Basic, Howell, regarding the bidding on another road project. Colosi testified that at the end of the meeting, as he was leaving the room, he heard Howell say to Shaw, "I'll see if we can get anything for this work." Colosi did not hear any reply by Shaw. Colosi further testified that he believed this referred to bid rigging and that Howell was talking about trading the job there being discussed for one in the future.

Basic contends that the district court erred in admitting this evidence because it claims there was no evidence that Shaw heard, understood, or acquiesced in Howell's statement to him so as to render the evidence admissible as an admission under FRE 801(d)(2)(B).

Howell, Colosi, and Shaw were all present in the same room when the conversation took place, and we think

there was credible evidence to support the government's position that Shaw heard, understood, and acquiesced in Howell's statement, thus meeting the requirements of FRE 801(d)(2)(B). *See United States v. Moore*, 522 F.2d 1068, 1075-76 (9th Cir. 1975). From the transcript, it is clear the court properly decided the relevance of the statement as going to Basic's defense that it had a long-standing policy against bid rigging, but, of course, as the trial court recognized, it could have been used by the jury for any purpose, and there was no request to limit it.

The testimony came during the government's case in chief and was in rebuttal to a defense Basic had previously articulated, that of its longstanding policy against bid rigging. Yet, at the time the evidence was admitted, the claimed defense had not been the subject of evidence offered by Basic or sought to be established by cross-examination. We think the practice of admitting evidence to refute a defendant's opening statement in a criminal case is a practice to be discouraged and that rebuttal evidence ordinarily should not be permitted for that purpose during the government's case in chief. A criminal case is far different from a civil case in which the pleaded position of a party may establish relevance, and in nearly all instances in the defense of a criminal case the defendant does not finally have to decide on the defense he will make until the government closes its case in chief. Thus, in some instances, admitting evidence to rebut a defense made by a criminal defendant only in the opening statement of his attorney may get highly prejudicial and irrelevant evidence into the record. In this case, the defendant followed through on its articulated defense, so any error committed in admitting the conversation between Howell and Shaw was harmless. But this is not to say that it would be so in all cases, and, as we have said, the practice should be discouraged.

III.

Branscome contends that it was reversible error for the district court to permit the introduction of evidence concerning the conviction of a codefendant, Howell. Howell, a former Basic employee, was included in the indictment against Basic and Branscome, but was tried and convicted separately prior to the trial of Branscome and Basic. At a pretrial conference, counsel for Basic said that he intended to bring out the fact that Howell was convicted, and the court ruled, over Branscome's objection, that both Basic and the government could refer to Howell's conviction.

During trial, two references were made to Howell's conviction. The first reference was made in the government's opening statement. The second reference was made during the direct examination of Colosi. When Colosi was asked about the result of Howell's trial, the court interrupted the questioning and stated that Howell had been tried and convicted. The court further said that the conviction of Howell had nothing to do with the trial of the other three defendants. At the conclusion of the trial, the court again cautioned the jury that they were not to be concerned with any disposition made with respect to a codefendant not on trial in the case at bar. No other reference was made to Howell's conviction.

Branscome's contention that the admission of this evidence is reversible error is controlled by *United States v. Curry*, 512 F.2d 1299 (4th Cir.), *cert. denied*, 423 U.S. 832 (1975). In *Curry* we held that it was not error for the court to tell the jury that certain codefendants charged in the same indictment as the defendants being tried had plead nolo contendre. *Id.* at 1303. We noted that, although it might be preferable to tell the jury only that the case against the codefendants had been previously disposed of, any prejudice caused by the evidence was cured by instructions that the jury could not consider the pleas as evidence of guilt of the defendants on

trial. *Id.* We therefore hold that the references made to Howell's conviction in conjunction with timely and appropriate cautionary instructions do not constitute reversible error. We caution, however, that it is far better to simply tell the jury that cases of codefendants not on trial have been disposed of without saying how, and that they should not consider that matter, particularly as evidence of guilt.

IV.

Steve Colosi, a key government witness, was one of the Basic employees directly involved in the bid-rigging conspiracy. At trial he testified as to the events surrounding the conspiracy charged and the practices and attitudes of other Basic employees regarding bid rigging. Basic attempted to impeach Colosi's testimony by presenting the testimony of two witnesses as to their opinions of Colosi's honesty and trustworthiness. According to Basic's offer of proof, these witnesses would have testified that Colosi was neither honest nor trustworthy. The district court, however, refused to admit the evidence, stating that it had "absolutely no place in this case."

Basic asserts that the district court erred in refusing to admit this evidence, and we agree. Federal Rule of Evidence 608(a) expressly allows impeachment through opinion evidence of a witness's character for truthfulness. *See United States v. Truslow*, 530 F.2d 257, 264-65 (4th Cir. 1975); A. Saltzburg & K. Redden, *Federal Rules of Evidence Manual* 346-47 (3d ed. 1982). Under the facts of this case, however, the district court's refusal to admit the evidence did not affect substantial rights and therefore was harmless error. 28 U.S.C. § 2111; Federal Rules of Criminal Procedure 52(a).

We base our conclusion that the exclusion of the evidence was harmless error on several considerations. First, Basic thoroughly attacked Colosi's credibility on cross-examination. Colosi admitted lying to counsel during a pre-trial interview about his bid-rigging activities,

to using without permission company vehicles and gasoline for personal purposes, and to paving his driveway with materials and labor procured from Basic. Second, at least one of the witnesses willing to testify as to his opinion of Colosi's character for honesty and trustworthiness was a Basic employee at the time of trial. This relationship to Basic might well have weakened the weight of that particular opinion evidence. Third, much of Colosi's testimony related to the events surrounding the April 1978 bid-rigging conspiracy. The government, however, presented the testimony of two other witnesses who were involved in the conspiracy, and their testimony regarding the events was in agreement with that of Colosi's testimony.

Taken together, these considerations lead us to the conclusion that it is highly unlikely that the district court's refusal to allow opinion evidence as to Colosi's character for truthfulness would have affected the outcome of the trial. We therefore hold that the district court's ruling was harmless error.

We have considered the appellant's remaining assignments of error and find them to be without merit.

Accordingly, the convictions are

Affirmed.

Judge Russell and Judge Butzner concur in the opinion and in the result.

Judge Widener concurs in all of the opinion except part IV. While he agrees that the failure to admit the evidence of Colosi's bad character for truthfulness was error, he does not agree that it was harmless, and thus he cannot agree in the result. He therefore respectfully dissents and would award a new trial.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 82-5207
82-5208

UNITED STATES OF AMERICA,
Appellee

v.

HENRY S. BRANSCOME, INC. and HENRY S. BRANSCOME,
Appellants

ORDER

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition shall be, and it hereby is, denied.

With the concurrences of Judge Russell and Judge Butzner.

/s/ H. Widener, Jr.
For the Court

Filed: August 5, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Newport News Division

Criminal Action No. 81-38-NN

UNITED STATES OF AMERICA

vs.

BASIC CONSTRUCTION CO., *et al.*

MEMORANDUM ORDER

Henry S. Branscome, Inc. and Henry Branscome individually have moved this Court to arrest the judgment of conviction returned against them, by jury, on February 26, 1982, or to grant them a new trial. Having reviewed the memoranda of the parties, and the record, the Court has concluded that no cause exists to set aside the jury verdict. Accordingly, defendants' motions are denied. Because most points now raised by defendants were raised previously, the Court will make only brief comment on selected points.

Defendants make much of what they consider to be the prosecution's mischaracterization of the Court's role in issuing immunity orders. Defendants claim that the Court's imprimatur was somehow placed upon the prosecution's case because the prosecution failed to disclose to the jury that the Court lacked discretion in the granting of immunity when the prosecution makes an immunity request. Despite their outrage, defendants failed to refer the Court to any case in which the failure to inform the jury of the Court's lack of discretion in immunity decisions caused

the setting aside of a jury verdict. If, indeed, the prosecution's statement contained any error, taken in the context of the entire trial, it can only be considered harmless.

Defendants are persistent in their claim that the acts for which they have been prosecuted have an insufficient nexus to interstate commerce to be actionable under the Sherman Act. 15 U.S.C. §§ 1, 2. Principally, defendants rely upon *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974). *Copp Paving Co.* makes it clear that the Sherman Act reaches all conduct having an affect on interstate commerce. In enacting the Sherman Act, Congress intended to exercise its full power to regulate interstate commerce. *Id.* at 194-95. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Id.* at 195, *quoting United States v. Women's Sportswear Mfgrs. Assn.*, 336 U.S. 460, 464 (1949).

Unlike the Clayton and Robinson-Patman Acts, the Sherman Act does not require a showing that the activities in issue were in the flow of interstate commerce. *Copp Paving Co., supra* at 195. Although not necessary to a Sherman Act case, defendants contend the Court instructed the jury: "That they could conclude that the defendants were engaged in activities that were in the flow of interstate commerce if they found 'that a substantial amount of interstate traffic moved on the highways, secondary roads and streets involved. . . .'" Defendants memorandum of points and authorities in support of motion for new trial at 13, quoting transcript of proceedings at 1118. Defendants argue that *Copp Paving Co.* precludes such an instruction, that the passage of interstate traffic on a roadway, without more, is insufficient basis for a finding that the defendants' activities were in the flow of interstate commerce. *See Copp Paving Co.* at 197-98.

Regardless of whether the building and resurfacing of roadways is in the flow of interstate commerce, and it should be noted that *Copp Paving Co.* involved the suppliers of roadbuilding materials, not the roadbuilders themselves, defendants misread the instructions. The challenged portion of the instruction does not discuss the flow of interstate commerce; it is concerned with the facts from which the jury could infer a substantial effect on interstate commerce. See transcript of proceedings at 1118.

Defendants have also moved the Court to require the prosecution to produce all material in its possession concerning statements made by any prosecution witness for *in camera* review. Defendants have set forth nothing that would cause this Court to conduct an *in camera* review. None will be undertaken.

Defendants' newly discovered evidence also does not require a new trial. The presence of a paralegal during the trial, employed by Crenshaw, Ware and Johnson, did not violate the Court's sequestration order.

Because no adequate cause exists to set aside the jury verdict, defendants' motion for arrest of judgment and a new trial are DENIED.

/s/ John A. MacKenzie
United States District Judge

Norfolk, Virginia

June 21, 1982

SUPREME COURT OF THE UNITED STATES

No. A-108

HENRY S. BRANSCOME, INC. AND HENRY S. BRANSCOME,
Petitioners,

v.

UNITED STATES

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Fourth Circuit, case Nos. 82-5207 and 82-5208, be, and the same is hereby, stayed pending the receipt of a response and further order of the undersigned or of the Court.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 12th day of August, 1983

DISTRICT COURT'S CHARGE TO THE JURY ON THE INTERSTATE COMMERCE ELEMENT OF THE OFFENSE

(Reproduced from Trial Transcript pages 1116-1119 and Court of Appeals Joint Appendix pages 359-362)

The fifth essential element of the offense prohibited by the Sherman Act is that the alleged bid rigging by a defendant must involve interstate commerce. Interstate commerce includes transactions occuring across state lines, or in the flow of interstate commerce, as well as transactions which occur entirely within a state, if they have a not insubstantial effect on interstate commerce.

A conspiracy may restrain interstate commerce even though some or all of the defendants are not engaged in interstate commerce and even though some or all of the means employed may be acts that occur wholly within a state, if there is not insubstantial effect on interstate commerce.

Interstate commerce, as I said, means traffic, transportation, communication, or commercial dealings across state lines, or in transactions which may occur within a state which have a not insubstantial effect on interstate commerce.

The Sherman Act would not be applicable to any case, and all defendants would be found not guilty, if the government has failed to establish beyond a reasonable doubt that the defendants' activities are in or have substantially affected interstate commerce—had failed to establish beyond a reasonable doubt that the defendants' activities are in or have substantially affected interstate commerce.

The government has attempted to prove that the defendants' local activities had a not insubstantial effect on interstate commerce by showing that a not insubstantial amount of liquid asphalt used in the resurfacing work at issue here was in fact manufactured outside the State of Virginia and then shipped into the state for the use of the defendants and the other alleged conspirators in making the asphalt cement used in paving the roads.

In order to find that the required effect on interstate commerce has been proved by the government in this case you should ask yourselves whether the bid rigging conspiracy alleged in the case has been shown as a matter of practical economics to have not an insubstantial effect on the interstate commerce involved. That is, the sale of liquid asphalt by interstate producers to Virginia buyers.

From the evidence presented you must determine whether the defendants' activities did or did not have such a substantial effect on interstate commerce. If you are satisfied that the government has proved that the defendants' activities had such a substantial effect on interstate commerce beyond a reasonable doubt, you may then go to consider whether or not any of the defendants was a member of the conspiracy, which is an element which would, of course, have to be first proved.

The government has sought to show that this element, in connection with interstate commerce, has been statisfied in two different ways. The first by showing that the highways, secondary roads and streets involved in the case were part of our network of interstate travel and commerce.

And the second effort by the government is based upon their offering evidence that a substantial amount of asphalt used on the project was manufactured or processed outside of Virginia and that it was then shipped into the state for use on the jobsites.

It is not necessary that the government prove all of these things. You may find that the government has proved the interstate commerce element of the crime if you find either that a substantial amount of interstate traffic moved on the highways, secondary roads and streets involved, or that a substantial amount of asphalt or other materials was manufactured outside of the state, shipped in commerce to Virginia and then used by the paving contractors on the highways.